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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 829

GLADYS N. WALLER, *Petitioner*

v.

NEW AMSTERDAM CASUALTY COMPANY, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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SUBJECT INDEX

	Page
PETITION	
Citations to Opinions Below	1
Jurisdiction	2
Question Presented	2
Statement of the Case	3
Reasons for Granting the Writ	7
Conclusion	20

CITATIONS

CASES:	
Austin v. Hopkins, 227 N.C. 638, 43 S.E. 2d 849 (1947)	12
Board of Education of Haywood County v. Town of Waynesville, 242 N.C. 558, 89 S.E. 2d 239 (1955)	15
Charles M. Britt Co. v. Barefoot & Tatum Drugs, 240 N.C. 755, 83 S.E. 2d 883, 884 (1954)	16
Connell Bros. Co. v. H. Diederichsen & Co., 213 Fed. 737 (9th Cir., 1914)	17
Coty, Inc. v. Prestonettes, Inc., 3 F. 2d 984 (2nd Cir., 1924)	17
Cutler v. Cutler, 130 N.C. 1, 40 S.E. 689 (1902)	17
Davidson v. Gifford, 100 N.C. 18, 6 S.E. 718 (1888)	18
Davis v. Whitehurst, 229 N.C. 226, 49 S.E. 2d 394	9
Dent v. English Mica Co., 212 N.C. 241, 193 S.E. 165 (1937)	14
Ford v. C. E. Wilson & Co., 129 F. 2d 214 (2nd Cir., 1942)	16
Gonzales v. Pacific Greyhound Lines, 34 Cal. 2d 749, 214 P. 2d 809 (1950)	18
Gorham v. Pacific Mutual Life Insurance Co., 214 N.C. 526, 200 S.E. 5 (1938)	15
Gossett v. Metropolitan Life Insurance Co., 208 N.C. 152, 179 S.E. 438 (1935)	15
Hankinson v. Pa. R. R. Co., 280 F. 2d 249 (3rd Cir., 1960)	17

	Page
Holm v. American Shipbuilding Co., 276 F. 2d 201 (6th Cir., 1960)	15
Jackson v. City of Gastonia, 247 N.C. 88, 100 S.E. 2d 241 (1957)	18
J. L. Roper Lumber Co. v. Elizabeth City Lumber Co., 137 N.C. 431, 49 S.E. 946, 948 (1905)	16
Keith v. Gregg, 210 N.C. 802, 188 S.E. 849 (1936)	15
LeBarron v. City of Harvard, 129 Neb. 460, 262 N.W. 26, 100 A.L.R. 767 (1935)	18
Lentz v. K. B. Johnson & Sons, 207 N.C. 614, 178 S.E. 226 (1935)	15
Lumbee River Conference v. Locklear, 246 N.C. 349, 98 S.E. 2d 453 (1957)	12
McGowan v. Beach, 242 N.C. 73, 86 S.E. 2d 763 (1955)	14, 15
Mellott v. United States, 257 F. 2d 798 (3rd Cir., 1958)	15
Mercer v. Williams, 210 N.C. 456, 187 S.E. 556 (1936)	15
Moore v. Humphrey, 247 N.C. 423, 101 S.E. 2d 460 (1958)	16
Nelson v. County of Los Angeles, 362 U.S. 1, 80 Sup. Ct. 527 at 532, 4 L. Ed. 2d 494 (1960)	16
New Amsterdam Casualty Company v. Gladys N. Waller, 196 F. Supp. 780 (MD NC 1961)	1
New Amsterdam Casualty Company v. Gladys N. Waller, 301 F. 2d 839 (4th Cir., 1962)	1
Newkirk v. Porter, 237 N.C. 115, 74 S.E. 2d 235 (1953)	13
New York, L. E. & W. R. Co. v. Estill, 147 U.S. 591, 13 Sup. Ct. 444, 37 L. Ed. 292 (1893)	16
Reliford v. Eastern Coal Corp., 260 F. 2d 447 (6th Cir., 1958)	16
Sawyer v. Staples, 224 N.C. 298, 29 S.E. 2d 892 (1944)	15
Sehley v. Pullman Car Co., 120 U.S. 575, 7 Sup. Ct. 730, 30 L. Ed. 789 (1887)	16
Simons v. Lebrum, 219 N.C. 42, 12 S.E. 2d 644 (1941)	15
Sovereign Camp v. Jones, 235 Ala. 378, 178 So. 891 (1938)	18
Thomas v. Taylor, 224 U.S. 73, 32 Sup. Ct. 403, 56 L. Ed. 673 (1912)	16
Virginian Railway Co. v. Mullens, 271 U.S. 220, 46 Sup. Ct. 526, 70 L. Ed. 915 (1926)	15
Weil v. Herring, 207 N.C. 6, 175 S.E. 836 (1934)	13
West v. West, 257 N.C. 760, 127 S.E. 2d 531, 532 (1962)	14

MISCELLANEOUS:

Page

North Carolina General Statute 39-15 3
North Carolina General Statute 39-17 4
100 A.L.R. 775 18
29 American Jurisprudence, Evidence, Section 557 18
24 American Jurisprudence, Fraudulent Conveyances, Section 211, Page 329 19
50 American Jurisprudence, Stipulations 10
50 American Jurisprudence, Stipulations, Section 2, Page 605 11
50 American Jurisprudence, Stipulations, Section 4, Page 607 11
50 American Jurisprudence, Stipulations, Section 8, Page 609 11
50 American Jurisprudence, Stipulations, Section 9, Page 610 11
50 American Jurisprudence, Stipulations, Section 12, Page 612 12
50 American Jurisprudence, Stipulations, Section 13. 18
83C.J.S., Stipulations, Section 17 16
Cyclopedia of Federal Procedure, 3rd Edition, Volume 9, Stipulations, 31.96 18
1 Glenn, Fraudulent Conveyances, Revised Edition, Section 113 9
2 North Carolina Index, Fraudulent Conveyances, Section 1 9
30 S. E. Digest, Stipulations, 904-915 12
United States Code, Title 28, Section 1253 2
United States Code, Title 28, Section 1332 2
Wigmore on Evidence, 3rd Edition, Volume 9, Section 2583 17

APPENDICES:

Appendix A, Original Opinion, District Court, dated August 17, 1961 ..... 1a
Appendix B, First Opinion of Fourth Circuit, dated April 6, 1962 ..... 22a
Appendix C, Second Opinion, District Court, dated September 21, 1962 ..... 35a
Appendix D, Judgment of Fourth Circuit, dated September 16, 1963 ..... 41a

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NEW AMSTERDAM CASUALTY COMPANY, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Petitioner, Gladys N. Waller, respectfully petitions this Honorable Court for a Writ of Certiorari to review a judgment and opinion of the Court of Appeals for the Fourth Circuit rendered in this cause on September 16, 1963. (see Appendix D, p. 41a), and in connection therewith respectfully shows the following:

CITATIONS TO OPINIONS BELOW

The opinions below involving this cause are reported in 196 F. Supp. 780 (MD NC 1961) (Appendix A); 301 F.2d 839 (4th Cir., 1962) (Appendix B; Opinion

of United States District Court for the Middle District of North Carolina dated September 21, 1962 (Appendix C) (no official citation); and Judgment of the Fourth Circuit dated September 16, 1963 (Appendix D) (no official citation).

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1253, which grants this Court power to review the decisions of the Circuit Courts by Writ of Certiorari upon the petition of any party to a civil case before or after rendition of judgment. In connection therewith, it is further shown as follows:

a. The opinion below was rendered and filed on September 16, 1963, without notation as to time of entry.

b. The Honorable Chief Justice of the United States signed an order on the 16th day of December, 1963, granting the petitioner additional time for filing the within petition to and including February 13, 1964.

c. The original jurisdiction of the Federal Court was based on diversity of citizenship concerning a controversy exceeding the sum of Ten Thousand Dollars ($10,000.00), exclusive of interest and costs. Title 28, United States Code, Section 1332.

QUESTION PRESENTED

1. Should a plaintiff recover on a legal theory it has solemnly and judicially disavowed, waived and disclaimed by formal stipulation and by sworn answers to interrogatories?

STATEMENT OF THE CASE

This action was brought by New Amsterdam Casualty Company, plaintiff, in December, 1959, as a result of a judgment it received in 1951 against the insolvent husband of the defendant, Gladys N. Waller, for the purpose of having the defendant declared a trustee as to some real property purchased in her name in 1950 and upon which property a home was constructed in 1953. The complaint appeared on its face to be an action founded on the legal theory of "fraudulent conveyance", which said theory has been reduced to statute in North Carolina.[1] [2]

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[1] § 39-15. *Conveyance with intent to defraud creditors void.*— For avoiding and abolishing feigned, covinous and fraudulent gifts, grants, alienations, conveyances, bonds, suits, judgments and executions, as well of lands and tenements as of goods and chattels, which may be contrived and devised of fraud, to the purpose and intent to delay, hinder and defraud creditors and others of their just and lawful actions and debts, every gift, grant, alienation, bargain and conveyance of lands, tenements and hereditaments, goods and chattels, by writing or otherwise, and every bond, suit, judgment and execution, at any time had or made, to or for any intent or purpose last before declared and expressed, shall be deemed and taken (only as against that person, his heirs, executors, administrators and assigns, whose actions, debts, accounts, damages, penalties and forfeitures, by such covinous or fraudulent devices and practices aforesaid, are, shall, or might be in anywise disturbed, hindered delayed or defrauded) to be utterly void and of no effect; any pretense, color, feigned consideration, expressing of use, or any other matter or thing to the contrary notwithstanding; and in all actions by creditors to set aside gifts, grants, alienations and conveyances of lands and tenements and judgments purporting to be liens on the same on the ground that such gifts, grants, alienations, conveyances and judgments are feigned, covinous and fraudulent hereunder, it shall be no defense to the action to allege and prove that the lands and tenements alleged to be so conveyed or encumbered do not exceed in value the homestead

After the cause was at issue, the plaintiff, by interrogatories and by oral discovery, sought to inquire into all transactions concerning the purchase of the lot, the construction of the home and the payments made thereon during the period 1950 through 1959. The defendant immediately objected to the inquiry of any matter or thing occurring prior to the three years next preceding the filing of the action due to the fact that a fraudulent conveyance was barred by the Three Year Statute of Limitations in North Carolina, in which state all transactions took place. The plaintiff thereupon advised the trial court orally, by written stipulation and by sworn answers to interrogatories, that it was not depending on the said North Carolina fraudulent conveyance statutes as a basis of recovery, and that it was

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allowed by law as an exemption: Provided, that nothing in this section shall be construed to authorize the sale under execution or other final process, obtained on any debt during the continuance of the homestead, of any interest in such land as may be exempt as a homestead. (50 Edw. III, c. 6; 13 Eliz., c. 5, s. 2; 1715, c. 7, s. 4; R. C., c. 50, s. 1; Code, s. 1545; 1893, c. 78; Rev., s. 960; C. S., s. 1005.)

[1] § 39-17. *Voluntary conveyance evidence of fraud as to existing creditors.*—No voluntary gift or settlement of property by one indebted shall be deemed or taken to be void in law as to creditors of the donor or settler prior to such gift or settlement, by reason merely of such indebtedness, if property, at the time of making such gift or settlement, fully sufficient and available for the satisfaction of his then creditors, be retained by such donor or settler; but the indebtedness of the donor or settler at such time shall be held and taken, as well with respect to creditors prior as creditors subsequent to such gift or settlement, to be evidence only from which an intent to delay, hinder or defraud creditors may be inferred; and in any trial shall, as such, be submitted by the court to the jury, with such observations as may be right and proper. (1840, c. 28, ss. 3, 4; R. C., c. 50, s. 3; Code, s. 1547; Rev., s. 962; C. S., s. 1007.)

depending on the equitable theory of "constructive trust" to obtain a judgment against the defendant for the monies she had received from her judgment debtor husband and which were invested in the lot or the home constructed thereon during the previous nine or ten years. Upon the foregoing representations by the plaintiff concerning its theory of the case, the trial court:

1. Concluded, based on the plaintiff's stipulation, that the action was founded on the theory of a "constructive trust" and that the Ten Year Statute of Limitations applied.

2. Struck the defendant's request for trial by jury due to the fact that the plaintiff had stipulated that it was not depending upon the legal theory of the said fraudulent conveyance statutes, but rather was basing its cause on an equitable theory called "constructive trust."

Thereafter, exhaustive discovery was made by the plaintiff, and the defendant's motion to limit the discovery and her motion for summary judgment concerning the Three Year Statute of Limitations were overruled.

All funds received by the defendant from her judgment debtor husband during the period in question were funds from his weekly earnings, and she has managed the family financial affairs since her marriage to the judgment debtor in 1920, and what she saved from the monies turned over to her by the judgment debtor was considered by both to be her own separate property. In 1951 and 1952 the defendant lived with her husband on a construction project in North Africa and saved Twelve Thousand Dollars ($12,-

000.00) from her husband's income, and upon returning to North Carolina in 1953, she spent the $12,000.00 as a down payment on the construction of her home and thereafter made payments on the mortgage from funds saved from her husband's salary and funds given to her by her children, all as detailed in Judge Stanley's original Findings of Fact as set forth in Appendix A, p. 1a.

The trial court awarded the plaintiff a judgment against the defendant for $12,000.00 because of the $12,000.00 down payment made in 1953, but held that the plaintiff failed to establish with any degree of certainty what other amounts, if any, had been paid on the home mortgage by the defendant from her husband's earnings after 1953.

Upon appeal to the Circuit Court, the Circuit Court held that the action rightfully was a cause of action based on the said North Carolina fraudulent conveyance statutes and that the Three Year Statute of Limitations should have been applied. It also disagreed with the trial court as to the certainty of funds which had been furnished from the judgment debtor's weekly salary checks during the three years next preceding the commencement of the action, and remanded the case concerning this particular finding of fact.

Upon remand, the trial court held a conference with the attorneys for the parties, and a stipulation was entered at the Court's request setting forth the gross and net amounts paid on the mortgage during the three years next preceding the institution of the action and it then entered judgment for the plaintiff for the net amount paid (gross less interest and one $2,900.00 payment identified as having been made by the defend-

ant's son). During the conference the attorney for the defendant suggested that the action should be dismissed due to the plaintiff's stipulation concerning its theory of its cause and, in the alternate, the defendant should have a jury trial since the Circuit Court had recognized that the cause of action depended upon the said statutes. The Court overruled both suggestions. The plaintiff suggested that it be allowed to file a supplemental complaint to inquire into the payments made by the defendant during the three years following the original filing of the complaint. The trial court overruled the suggestion. Both sides appealed, and the Circuit Court ruled, in the decisions appealed from herein, that:

a. The stipulation did not bar the plaintiff from recovery and that just because it tried to get the "whole loaf", it should not be denied a more limited portion based on a theory the plaintiff had theretofore solemnly disclaimed in an attempt to evade the Three Year Statute of Limitations.

b. The Circuit Court overruled the trial court and permitted the plaintiff to file a supplemental complaint.

The Circuit Court did not rule on defendant's request that she be allowed trial by jury on the issues which are completely legal and which had been decided by the Court sitting without a jury, notwithstanding defendant's demand.

REASONS FOR GRANTING THE WRIT

This is a diversity action and should be decided under the laws of the State of North Carolina, or at least in accordance with well established principles

concerning stipulations and answers to interrogatories. If the present decision concerning the effect of plaintiff's stipulation is allowed to stand, the following situation will exist in the State of North Carolina.

a. In the Federal Courts solemn stipulations and sworn answers to interrogatories will be no more binding upon the parties than initial pleadings, which are liberally construed under the Federal Rules of Civil Procedure.

b. Discovery and stipulations will mean nothing to the parties or their attorneys, and confusion will reign concerning all issues which arise from the taking of depositions, from the submission of interrogatories and from the detailed and laborious task of entering into stipulations, which are normally considered extremely advantageous to all parties and to the judicial system.

c. A stipulation will have one effect in the Federal Courts of North Carolina and a completely different effect in a State Court, although the subject matter of the litigation is identical. In this particular instance, as shown hereinbelow, had this action been tried in the State Court, the plaintiff would have been barred from recovery under the State law.

d. If the subject decision of the Fourth Circuit is allowed to stand, there will be an apparent conflict between the law of the Fourth Circuit, the Third Circuit, the Sixth Circuit and the Second Circuit, as cited hereinbelow.

e. If the Fourth Circuit's present decision is allowed to stand, any plaintiff can defeat any defendant's right to trial by jury just by alleging or stipulating that it is not depending upon any legal theory even though,

in the last analysis, it must proceed and obtain its judgment on a legal theory or statute, as in the instant case.

The indisputable fact is that, win or lose, the final disposition of this case now turns upon the legal effect of plaintiff's stipulation rather than any finding of fact as to the certainty of any sums given to the defendant by her insolvent judgment debtor husband. This would be true whether the gifts were fraudulent in law or in fact, because the said statutes are the plaintiff's exclusive remedy.

"The burden of proof is on plaintiff to establish that the conveyance or transfer comes within the statute, and the complaint must allege the facts and circumstances constituting the fraud, and a mere averment that the transaction was fraudulent is insufficient"; 2 North Carolina Index, Fraudulent Conveyances, Section 3, P. 399, citing *Davis* v. *Whitehurst*, 229 N.C. 226, 49 S.E.2d 394.

"The creditor's right under the Statute, we repeat, is a right to act, not to disclaim, and consequently he may ratify the transaction as he sees fit. As we have heretofore said, and will take occasion hereafter to repeat, the fraudulent conveyance, first and last, is a real act; and, if the creditor chooses to not push over the transaction, why then; it remains standing: To go free, the grantee needs no release under seal from the creditor, no accord and satisfaction. The creditor may, if he pleases, affirm the transaction or ratify it; and that, once done with full knowledge of the facts, it will be a bar to a subsequent action based on disaffirmance. This rule applies indifferently to a liquidator or other representative of creditors, and to the individual creditor who pursues his own remedy." 1 Glenn, Fraudulent Conveyances, Revised Edition, Section 113, P. 223.

We find in Volume 2A of the General Statutes of North Carolina, Recompiled 1950 by The Michie Company, at Page 286, under the Fraudulent Conveyance Statute, the following editor's note:

> "This section is a substantial re-enactment of the statute 13 Eliz., c. 5, sec. 2. *Bank* v. *Adrian* 116 N.C. 537, 21 S.E. 792 (1895). Prior to its enactment it was necessary to invoke the aid of a court of equity to have a deed declared void for fraud, and where, under a statutory provision, deeds were pronounced void as against creditors in order to secure a formal declaration of their invalidity, the moving party must have asked for relief that would have been formerly administered solely in a court of equity. *Farthing* v. *Carrington*, 116 N.C. 315, 22 S.E. 9 (1895). At an early period in the judicial history of this State, it was held that courts of law might hear evidence and pass even incidentally upon the question whether a deed was fraudulent under 13 Eliz. *Logan* v. *Simmons*, 18 N.C. 13 (1834); *Lee* v. *Flannagan*, 29 N.C. 471 (1847); *Hardy & Bro.* v. *Skinner*, 31 N.C. 191 (1848); *Helms* v. *Green*, 105 N.C. 251, 11 S.E. 470 (1890). The statute of 13 Eliz. is declaratory of the common law so far as regards existing creditors; in this sense the statute is sometimes spoken of as being in affirmance of the common law. The remedy given to subsequent creditors rests entirely upon the enactment of the statute. *Long* v. *Wright*, 48 N.C. 290 (1856)."

What is the effect of plaintiff's stipulation? Turning to the authorities, we first observe the following general discussion of a stipulation in 50 Am. Jur., Stipulations:

> "A stipulation . . . is an agreement, admission, or concession made in a judicial proceeding by the parties thereto or their attorneys, in respect of

some matter incident thereto, for the purpose, ordinarily, of avoiding delay, trouble, and expense. (Section 2, P. 605). . . . It may be stated as a broad, general rule, subject to certain limitations hereinafter noted, that any matter relating merely to the conduct of a pending proceeding, or to the determination of the issues involved therein, which affects only the rights or the convenience of the parties thereto and does not involve any interference with the proper duties and functions of the court, may be the subject of a stipulation. (Section 4, P. 607). . . . As a general rule, stipulations should receive a fair and liberal construction, in harmony with the apparent intention of the parties and the spirit of justice, and in the furtherance of fair trials upon the merits rather than a narrow and technical one calculated to defeat the purposes of their execution. (Section 8, P. 609). . . . *In all cases of doubt, that construction should be adopted which is favorable to the party in whose favor it is made.* (Section 8, P. 609). . . . Subject to the conditions and limitations respecting the subject matter and in compliance with statutory requisites or rules of court, and to rights in respect of withdrawal or relief, *stipulations made by parties to a judicial proceeding, or by their attorneys, within the scope of their authority, are binding upon those whom they lawfully represent, and also upon the trial and appellate courts*, in the absence of any valid ground or reason for refusing enforcement. (Section 9, P. 610). . . . The courts look upon stipulations with favor, and as a rule, will enforce all stipulations of parties or their attorneys for the government of their conduct or the control of their rights in the trial of a cause or the conduct of litigation. If such stipulations are not unreasonable, not against good morals or sound public policy, are within the general scope of the case made by the pleadings, and are in such form as may be required by rule of court or statu-

tory enactment. (Section 12, P. 612)." (Emphasis added)

Turning to the North Carolina authorities, we find it is well established that the parties may not avoid the effect of their stipulations. See generally, 30 S.E. Digest, Stipulations; pp. 904-915. In *Lumbee River Conference* v. *Locklear*, 246 N.C. 349, 98 S.E.2d 453 (1957), there was a dispute as to the use of certain church property. The question there turned on whether the church was an independent sovereign body or subject to the rules and regulations of the Conference. The trial court found for the defendant, but the Supreme Court of North Carolina reversed, holding that the stipulation entered into by the defendant to the effect that the church was a member of the Conference was binding on him and thus he was precluded from later arguing that the church was independent. Thus, the Supreme Court of North Carolina forbade the defendant to take a position contra to that to which he had earlier stipulated. There is little doubt but that the North Carolina Supreme Court would hold the same way in this case were the question presented to it.

Likewise, in *Austin* v. *Hopkins*, 227 N.C. 638, 43 S.E. 2d 849 (1947), the plaintiff sued to establish the exact boundary of property, and the defendant answered on the theory that he owned the property in question by adverse possession. However, the defendant had agreed before the trial that title to the property was not in issue and that the only question was the location of the true boundary line. The Supreme Court in that case affirmed the trial court's refusal to charge on the theory of adverse possession, holding that the defendant's stipulation compelled this result:

"The defendant cannot assert title to the disputed area by adverse possession in face of the stipulation entered into by him." 43 S.E.2d 849.

The case is also precisely parallel to this one, for, here the only question which the plaintiff presented was whether the defendant was liable under the theory of a constructive trust; the plaintiff stipulated that it was not relying on the fraudulent conveyance statutes of North Carolina in any way. It is thus impossible to conceive how any relief whatsoever can be granted on the basis of the North Carolina Statutes or law.

Having disposed of the plaintiff's supposed theories of constructive trust and fraudulent conveyance, it only remains to inquire whether there is any other possible basis for granting relief to the plaintiff in this case. If the plaintiff should endeavor to dream up some new theory of fraud which lies outside the fraudulent conveyance statutes of North Carolina, then it only need be said that in this case there has been an express finding of absence of fraud or bad faith of any sort; and, in any event, should the plaintiff be allowed to proceed on any other theory?

The law on this point is clear and unbroken. There are no exceptions. Having tried the case on one theory, a party to the trial will not be allowed to subsequently change his position. He will not be permitted to "swap horses between courts in order to get a better mount in the Supreme Court." *Weil* v. *Herring*, 207 N.C. 6, 175 S.E. 836 (1934), at 838.

One of the more recent cases supporting this well accepted rule is *Newkirk* v. *Porter*, 237 N.C. 115, 74 S.E.2d 235 (1953). There plaintiff claimed title in a boundary dispute on the basis of adverse possession.

A nonsuit for the defendant was entered and was affirmed on appeal as plaintiff had failed to show continuity of possession for the requisite period. At Page 240 of 74 S.E.2d:

> "Nor does the record justify retaining the cause for trial on the theory of a processioning proceeding under G. S. Section 38-1, et seq. The case was both cast by the pleadings and tried below on the other theory. The theory of the trial prevails on appeal."

Also, see *Enos West* v. *Addie West and Wife, Millie Jones West, et als.*, 257 N.C. 760, 127 S.E.2d 531, 532 (1962), where the Supreme Court of North Carolina quoted as follows:

> "A stipulation is a judicial admission. As such, 'it is binding in every sense, preventing the party who makes it from introducing evidence to dispute it, and relieving the opponent from the necessity of presenting evidence to establish the admitted fact'."

Where the issue at the trial was whether the instrument was executed by the deceased, and on appeal the validity of the seal was first attacked, the court held that it could not consider the matter. *McGowan* v. *Beach*, 242 N.C. 73, 86 S.E.2d 763 (1955).

In an action to recover for services rendered under an employment contract, the defense in the trial court was based on the theory that no contract existed. The employer could not have the theory that the contract was not binding or enforceable considered on appeal. *Dent* v. *English Mica Co.*, 212 N.C. 241, 193 S.E. 165 (1937).

The defense of an insuror at trial was that the insured was not entitled to benefits. On appeal, the insuror could not successfully contend that the insured accepted checks in full payment where there were no pleadings or issues regarding such acceptance at the trial of the case. *Gossett* v. *Metropolitan Life Insurance Co.*, 208 N.C. 152, 179 S.E. 438 (1935).

Thus, the uncontested rule emerges. "An appeal *ex necessitate* follows the theory of the trial." *McGowan* v. *Beach*, 242 N.C. 73, 86 S.E.2d 763, 766 (1955); *Sawyer* v. *Staples*, 224 N.C. 298, 29 S.E.8d 892 (1944). The citations could be endless, but the general principle that a party is bound by the theory he pursues at trial is supported by: *Lentz* v. *K. B. Johnson & Sons*, 207 N.C. 614, 178 S.E. 226 (1935); *Mercer* v. *Williams*, 210 N.C. 456, 187 S.E. 556 (1936); *Keith* v. *Gregg*, 210 N.C. 802, 188 S.E. 849 (1936); *Gorham* v. *Pacific Mutual Life Insurance Co.*, 214 N.C. 526, 200 S.E. 5 (1938); *Simons* v. *Lebrum*, 219 N.C. 42, 12 S.E. 2d 644 (1941); *Board of Education of Haywood County* v. *Town of Waynesville*, 242 N.C. 558, 89 S.E.2d 239 (1955).

The decisions of the United States Supreme Court are also clear and unwavering on this point. In *Virginian Railway Co.* v. *Mullens*, 271 U.S. 220, 46 Sup. Ct. 26, 70 L. Ed. 915 (1926), plaintiff sued for injuries alleged to have resulted from an obstruction caused by the defendant, which suit was based on tort. The court would not allow him to support his judgment on a theory that the company was liable due to a contractual obligation. The *Virginian* case has been cited and followed in *Mellott* v. *United States*, 257 F.2d 798 (3rd Cir., 1958); *Holm* v. *American Ship-*

building Co., 276 F.2d 201 (6th Cir., 1960); *Ford* v. *C. E. Wilson & Co.*, 129 F.2d 214 (2nd Cir., 1942). For a discussion of the case, see majority and dissenting opinions in *Relyford* v. *Eastern Coal Corp.*, 260 F.2d 447 (6th Cir., 1958), at 457.

Other Supreme Court cases to the same effect are *New York, L. E. & W. R. Co.* v. *Estill*, 147 U.S. 591, 13 Sup. Ct. 444, 37 L. Ed. 292 (1893) (seeking a different basis of damages on appeal bound by actions in trial court); *Thomas* v. *Taylor*, 224 U.S. 73, 32 Sup. Ct. 403, 56 L.Ed. 673 (1912); *Nelson* v. *County of Los Angeles*, 362 U.S. 1, 80 Sup. Ct. 527 at 532, 4 L. Ed. 2d 494 (1960).

Courts are generally bound by and must enforce stipulations regarding matters which may validly be made the subject of stipulations. 83 C.J.S., Stipulations, Section 17; *Moore* v. *Humphrey*, 247 N.C. 423, 101 S.E. 2d 460 (1958).

See also, *Charles M. Britt Co.* v. *Barefoot & Tatum Drugs*, 240 N.C. 755, 83 S.E.2d 883 (1954), at 884: "... the appeal follows the theory of the trial as fixed by stipulations, ..." This rule and the reasons behind it are most exhaustively treated in *J. L. Roper Lumber Co.* v. *Elizabeth City Lumber Co.*, 137 N.C. 431, 49 S.E. 946 (1905).

The Federal cases are no less decisive on this point. See, for example, *Schley* v. *Pullman Car Co.*, 120 U.S. 575, 7 Sup. Ct. 730, 30 L.Ed. 789 (1887) (stipulation binding and limits case on appeal); *New York, L. E. & W. R. Co.* v. *Estill*, 147 U.S. 591, 13 Sup. Ct. 444, 37 L. Ed. 292 (1893) (where the parties agreed that damages to cattle were to be based on the value of cattle

at their ultimate destination, the defendant could not contend on appeal that the true basis of damages was the value of the cattle as they were delivered at the terminus of its road). In *Hankinson* v. *Pa. R. R. Co.*, 280 F.2d 249 (3rd Cir., 1960), the Government was a third party defendant in a suit against a railroad. The Government recognized by stipulation the liability of the railroad to its employee. This later precluded the Government from denying indemnification to the railroad on the grounds that the railroad was a volunteer in settling with the employee, even though there was a finding that the railroad was not negligent. The Government was bound by its stipulation, and the law encourages settlement. Other cases include *Connell Bros. Co.* v. *H. Diederichsen & Co.*, 213 Fed. 737 (9th Cir., 1914), and *Coty, Inc.* v. *Prestonettes, Inc.*, 3 F.2d 984 (2nd Cir., 1924) (issue of unfair competition held removed from case due to stipulation).

Thus, with a rule well settled and accepted for the determination of cases on appeal, we must turn to its application where a case is remanded for further proceedings. In Wigmore on Evidence, 3rd Ed., Vol. 9, Section 2593 (citing as contra, *Cutler* v. *Cutler*, 130 N.C. 1, 40 S.E. 689 (1902)), it is stated:

> "Whether a judicial admission continues to have effect for a subsequent part of the same proceedings, including a new trial, has been the subject of some opposition of rulings, although the orthodox English practice plainly answered in the affirmative."

In the *Cutler* case, an admission of fact at the first trial was given merely for the purpose of avoiding a continuance, because of the absence of a witness, and

could not be used at a subsequent trial, the witness being present and notice being given that the admission would be objected to. That a stipulation will be considered binding is shown by *Jackson* v. *City of Gastonia*, 247 N.C. 88, 100 S.E.2d 241 (1957). There the parties stipulated as to the amount of plaintiff's recovery, if any, so as to dispense with the proof in respect to damages. This stipulation remained conclusive and binding upon the parties on remand of the case for entry of judgment in accordance with the stipulation of the parties, citing 100 A.L.R. 775; 50 Am. Jur., Stipulations, Section 13; and 30 Am. Jur., Evidence, Section 557. 100 A.L.R. is a rather extensive annotation on the availability of a stipulation or a formal admission of facts by counsel for a subsequent trial. In *Davidson* v. *Gifford*, 100 N.C. 18, 6 S.E. 718 (1888), the court says that clear, distinct, formal and solemn admissions *may be used* at a subsequent trial. The *Jackson* case, *supra*, is also authority for this point in North Carolina. As representative of what are the more generally accepted rules are *Sovereign Camp* v. *Jones*, 235 Ala. 378, 178 So. 891 (1938); *LeBarron* v. *City of Harvard*, 129 Neb. 460, 262 N.W. 26, 100 A.L.R. 767 (1935); and *Gonzalez* v. *Pacific Greyhound Lines*, 34 Cal. 2d 749, 214 P.2d 809 (1950).

Thus, a strong and favorable line of authority is present, and according to the Cyclopedia of Federal Procedure, 3rd Ed., Vol. 9, Stipulations, 31.06, "... the use of stipulations is general in all courts, and in a strict sense there is little, if any, practice relating thereto which can be said to be particularly or distinctively applicable to Federal Courts."

As this Honorable Court knows, the trial courts are strictly enforcing discovery rules and are requiring

the parties to enter into stipulations as to undisputed facts and as to other matters and things which will bring into clear focus the exact facts and the contentions of the parties as to fact and law, and it is the opinion of the defendant that this procedure in the trial courts is extremely advantageous to all parties and to the judicial system and that it would be very detrimental to the entire system and to the procedures if the plaintiff not be bound by its solemn admissions and stipulation concerning its theory and cause of action. The plaintiff was well informed of the defendant's position from start to finish concerning the fraudulent conveyance statutes, and the plaintiff solemnly disavowed these statutes in an effort to bring its cause of action under the ten-year statute of limitations rather than to proceed in the action on the logical legal theory available. This resulted in extensive and needless litigation, time and effort, and the defendant has been greatly harmed in defending this action, which plaintiff based on the groundless theory of constructive trust in an attempt to evade the three-year statute of limitations. In this connection, the plaintiff did not cite any case or advance any reason in the Court below which would excuse or mitigate its solemn stipulation or sworn answers to the interrogatories concerning its theory of its case.

> "Courts of equity are not tribunals for the collection of debts; they afford aid to enable creditors to obtain payment only where legal remedies have proved to be inadequate and it is only by the exhibition of such facts as show that these have been exhausted that equity jurisdiction attaches." 24 Am. Jur., Fraudulent Conveyances, Section 211, Pp. 329.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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